

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re)	
)	
MARITIME	)	EB Docket No. 11-71
COMMUNICATIONS/LAND MOBILE,	)	File No. EB-09-01-1751
LLC	)	FRN: 001358779
)	
Participation in Auction No. 61 and Licensee)	
Of Various Authorizations in the Wireless)	
Radio Services)	
	)	Application File Nos. 0004030479,
Applicant for Modification of Various	)	0004144435, 0004193028,
Authorizations in the Wireless Radio	)	0004193328, 0004354053,
Services	)	0004309872, 0004310060,
	)	0004314903, 0004315013,
Applicant with ENCANA OIL AND GAS	)	0004430505, 0004417199,
(USA), INC.; DUQUESNE LIGHT	)	0004419431, 0004422320,
COPANY; DCP MIDSTREAM, LP;	)	0004422329, 0004507921,
JACKSON COUNTY RURAL,	)	0004153701, 0004526264,
MEMBERSHIP ELECTRIC	)	0004636537, and 0004604962
COOPERATIVE; PUGET SOUND)	
ENERGY, INC.; INTERSTATE)	
POWER AND LIGHT COMPANY;)	
WISCONSIN POWER AND LIGHT)	
COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.;)	
ATLAS PIPELINE – MID CONTINENT,)	
LLC; DENTON COUNTRY ELECTRIC)	
COOPERATIVE, INC., DBA COSERV)	
ELECTRIC; AND SOUTHERN)	
CALIFORNIA REGIONAL RAIL)	
AUTHORITY)	
)	
For Commission Consent to the Assignment)	
Of Various Authorizations in the Wireless)	
Radio Services)	

To: Marlene H. Dorch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

**AUTHORITIES IN SUPPORT OF THE HAVENS/SKYTEL DEFINITION OF
“CONSTRUCTED” AND “CONSTRUCTION”**

In Order No. 12M-53, the Honorable Richard L. Sippel, Chief Administrative Law Judge, directed me as “new counsel for Mr. [Warren] Havens and SkyTel companies ... to submit authorities relied on by Mr. Havens for his proposed definition of [the] term ‘constructed.’” I respectfully offer the following recitation and analysis of legal authorities in support of Mr. Havens's and SkyTel companies’ definition of the term “constructed” and its variants, especially “construction.”

- I -

With respect to the core definition of “constructed” and related basic law, Mr. Havens and SkyTel companies propose to define the term “constructed” according to the following core description:

An incumbent Automated Maritime Telecommunications System is deemed to be “constructed” if all the necessary equipment¹ and each station in the system and system authorization are in place, and the system has been built in compliance with the terms of the then-current authorization.

The following authorities and analysis support and explain this core definition.

Initially, all FCC authorizations (licenses) are issued and may remain valid based upon the applicable rules in effect at the time of their issuance. Failure to comply with those rules and with terms based on those rules is cause for revocation, *see* 47 U.S.C. § 312(a)(4), and, under some circumstances, “automatic termination.” As I shall clarify

¹ Although it is beyond the scope of this summary memorandum to provide details of required station equipment, I note that AMTS is common carrier CMRS. *See* 47 U.S.C. §20.9(a)(3) (describing AMTS as a form of “public coast” service). CMRS requires Interconnection. *See* § 20.5 (defining CMRS). Moreover, since a base station cannot support subscribers solely by one-way signals from the station to subscribers, CMRS service requires station equipment that allows subscribers (who, as I argue below, are a *sine qua non* of “construction”) to communicate back to the base station.

further, this core definition incorporates the relevant rules, including those defining “constructed” and “construction.”

Section 1.946 of the FCC’s rules, 47 C.F.R. § 1.946, sets forth the Commission’s “[c]onstruction and coverage requirements”: “For each of the Wireless Radio Services, requirements for construction and commencement of service or commencement of operations are set forth in the rule part governing the specific service.” § 1.946(a). The term “construction period” refers to “the period between the date of grant of an authorization and the date of required commencement of service or operations.” *Id.*

Licensees in certain wireless radio services must also satisfy “geographic coverage” or “substantial service” requirements: “In certain Wireless Radio Services, licensees must comply with geographic coverage requirements or substantial service requirements within a specified time period. These requirements are set forth in the rule part governing each specific service.” § 1.946(b).² The term “coverage period” refers to “the period between the date of grant of an authorization and the date that a particular degree of coverage or substantial service is required.” *Id.*

The failure to meet either the obligation to construct (to “commence[.]” required “service or operations”) or to cover (to satisfy a requirement of “a particular degree of coverage or substantial service”) leads to the automatic termination of a licensee’s authorization: “If a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.” §

² “Geographic” coverage requirements refer to a wider area, with multiple sites.

1.946(a). Section 1.955 of the Commission's rules confirm that authorizations held by licensees who fail to meet applicable construction or coverage requirements will be automatically terminated: "Authorizations automatically terminate (in whole or in part as set forth in the service rules), without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements. *See* § 1.946(c)." 47 C.F.R. § 1.955(a)(2).

AMTS is a species of CMRS. For commercial mobile radio services, the "construction period" is defined as "[t]he period between the date of grant of an authorization and the date of required commencement of service." 47 C.F.R. § 22.99. This definition, which applies to AMTS as a species of CMRS, reinforces the interdependence between "construction" and the "commencement of service." Construction is what must take place between the "grant of an authorization" and the "commencement of service" required of the holder of that authorization.

Practically and axiomatically, "commencement of service" requires physical "construction." In turn, "construction" serves strictly to provide "service" to customers.

Construction and coverage requirements "are set forth in the rule part governing each specific service." 47 C.F.R. § 1.955(b); *cf.* § 1.955(a) (providing that "[f]or each of the Wireless Radio Services," construction requirements "are set forth in the rule part governing the specific service"). Part 80 of the Commission's rules sets forth the construction and coverage requirements governing AMTS. Section 80.49 prescribes the rules governing AMTS licenses. The relevant subsection begins by reciting the requirements expected of AMTS geographic licensees:

Each AMTS coast station geographic area licensee must make a showing of substantial service within its service area within ten years of the initial

license grant, or the authorization becomes invalid and must be returned to the Commission for cancellation. “Substantial” service is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.

§ 80.49(a)(3). The rule then prescribes the rules governing site-based AMTS licenses:

For site-based AMTS coast station licensees, when a new license has been issued or additional operating frequencies have been authorized, if the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.

§ 80.49(a)(3). In sum, an AMTS geographic licensee “must make a showing of substantial service within its service area within ten years of the initial license grant.” A site-based AMTS licensee must place a new station or new frequencies “in operation within two years from the date of the grant.”

- II -

I turn now to the regulatory treatment of AMTS as a system, and *system coverage* as part of the required construction:

The acronym AMTS (including as used in §80.49(a)(3)) stands for a “system.” The provision of AMTS service under site-based system licenses requires not merely a single station, but rather a series of stations comprising an entire system. *See, e.g.*, 47 C.F.R. § 80.475(a) (2001) (referring to “each ... station in a system”); *In re Fred Daniel d/b/a Orion Telecom*, 11 F.C.C.R. 5764, 5764 n.1 (1996) (“The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system ... for vessels to use along a waterway. *AMTS offers improved services over those available from individual public coast stations.*” (emphasis added)). The site-based licenses at issue in this proceeding derive their authorization from the pre-2002

version of the FCC’s rules, which demand continuity of service of all providers of AMTS service:

AMTS applicants proposing to serve inland waterways *must* show how the proposed system will provide *continuity of service* along more than 60% of each of one or more navigable inland waterways. ... AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline *must* define a substantial navigational area and show how the proposed system will provide *continuity of service* for it.

47 C.F.R. § 80.475(a) (2001) (emphases added); *see also In re Amendment of Parts 2 and 80 of the Commission’s Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, 6 F.C.C.R. 437, 440 (1991) (acknowledging that “continuity of service has always been a goal” of AMTS regulation and describing steps that the Commission would take to “ensure continuity of service” along the Atlantic, Pacific, and Gulf of Mexico coasts). Although the Commission in 2002 removed the “continuity of service” requirement from § 80.475(a), *see Amendment of the Commission’s Rules Concerning Maritime Communications*, 17 F.C.C.R. 6685, 6737 (2002) (amending 47 C.F.R. § 80.475(a)), the previous rule’s “continuity of coverage” requirement had already served its purpose. By 2002, construction deadlines for all site-based licenses subject to this coverage requirement had passed.³ Inasmuch as the pre-2002 version of § 80.475(a) (whose applicability to licenses granted under its authority — namely, all site-based AMTS licenses — has never been questioned) and ongoing Commission practice has continued to uphold the public interest in uninterrupted service along the waterway for which the multi-site system license was issued, continuity of service constitutes a

³ As to operations following construction and commencement of service, the FCC has consistently reasoned “that allowing incumbent licenses to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide,” *id.* at 6699; *accord In re Maritime Communications*, 18 F.C.C.R. 24,391, 24,400 & n.84 (2003).

required element of an incumbent AMTS licensee's obligation to "construct" its system according to the terms of its authorization.

In a 2009 declaratory ruling issued under 47 C.F.R. § 1.2 to Maritime, the Wireless Bureau has expressly recognized the applicability of the "continuity of service" requirement imposed by the pre-2002 version of § 80.475(a):

It is our understanding that MC/LM is concerned that, unless Section 80.385(b) is interpreted as requested, there exists the potential for a geographic AMTS licensee to interpose a station between two of the incumbent's stations. The Commission has concluded, however, that such a scenario will not occur if the incumbent licensee *constructed its system* in compliance with the *then-existing requirement to maintain continuity of service*, see 47 C.F.R. § 80.475(a) (1999). See Amendment of the Commission's Rules Concerning Maritime Communications, Third Memorandum Opinion and Order, PR Docket No. 92-257, 18 FCC Rcd 24391, 22401 ¶¶ 23-24 (2003).

Request by Maritime Communications/Land Mobile, LLC for Clarification of Sections 80.385 and 80.215 of the Commission's Rules, DA 09-793 (April 8, 2009) (emphases added).

- III -

I shall now discuss *service to customers* as part of the construction requirement:

Section 80.60 of the Commission's rules shed further light on the meaning of "construct," "construction," and other derivatives of those words. Under § 80.60(d)(3), the "original construction deadline[s] ... as set forth in § 80.49" apply to "[p]arties seeking to acquire a partitioned license or disaggregated spectrum from a site-based AMTS ... licensee." 47 C.F.R. § 80.60(d)(3). Such parties "will be required to construct and commence 'service to subscribers' in all facilities acquired through such transactions within the original construction deadline for each facility as set forth in § 80.49." §

80.60(d)(3). Again, licensees who fail to meet this deadline face the automatic termination of their authorizations: “Failure to meet the individual construction deadline will result in the automatic termination of the facility’s authorization.” *Id.*⁴

Section 80.60’s specific requirement of “service to subscribers” indicates why and how construction and coverage requirements ensure the actual provision of service to the public and prevent the hoarding of FCC-licensed spectrum. “Service to subscribers” is defined under the Commission’s CMRS rules as “[s]ervice to at least one subscriber that is not affiliated with, controlled by or related to the providing carrier.” 47 C.F.R. § 22.99. In adopting rules designed to harmonize its treatment of commercial and private mobile radio services, the FCC reasoned that the requirement of provision of service to at least one subscriber — a requirement that the Commission characterized as “hardly burdensome” — would provide “an added safeguard against” evasive behavior by a licensee who “could chose to construct minimal facilities in order to warehouse spectrum rather than provide actual service.” *In re Regulatory Treatment of Mobile Services*, 9 F.C.C.R. 7988, 8075 (1994).⁵

⁵ The relevant passage from this decision is illuminating and worth quoting at greater length:

“[S]ervice to subscribers” is defined to mean provision of service to at least one party unaffiliated with, controlled by, or related to the providing carrier. This requirement serves the interests of regulatory symmetry by imposing a uniform definition of service commencement on all CMRS services.... The requirement of securing one customer is hardly burdensome.... [I]t remains possible that a licensee could choose to construct minimal facilities in order to warehouse spectrum rather than provide actual service. Thus, the service commencement requirement serves as an added safeguard against such behavior.

Id. at 8075 (emphases added).

- IV -

This memorandum's summary of AMTS site-based licenses' construction requirements and their regulatory purposes is reflected in various FCC decisions. The decision by the Chief of the Wireless Bureau in 2002 in *In re Paging Systems, Inc.*, 15 F.C.C.R. 23,983 (2000), is particularly instructive:

AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. [note 2] Pursuant to Section 80.49(a)(2) of the Commission's Rules AMTS stations must be *[constructed and] placed in operation* within eight months of the license grant. [note 3] ... We note that under Section 1.955(a)(2) of the Commission's Rules, authorizations *automatically terminate, without specific Commission action*, if the licensee fails to meet applicable *construction* or *coverage* requirements. [note 9] ... We may waive Section 1.955(a)(2) of the Commission's Rules in order to consider PSI's request for an extension of the *construction* deadline if a) the underlying *purpose* of the rule would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. [note 10] We conclude that PSI has not demonstrated that a waiver is warranted under either standard. First, we believe that the *underlying purpose of the rule, i.e., to ensure that service is provided to the public within a reasonable time following grant of the license*, [note 11] is furthered by applying the rule to this case.

[note 2] See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), First Report and Order, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

[note 3] 47 C.F.R. § 80.49(a)(2). In Amendment of the Commission's Rules Concerning Maritime Communications, *Fourth Report and Order and Third Further Notice of Proposed Rule Making*, PR Docket No. 92-257, FCC 00-370, ¶17 (rel. Nov. 16, 2000), the Commission extended the *construction requirement* for new [site-based] AMTS stations from eight months to two years. The new rule will not become effective until 30 days after publication in the Federal Register. *Id.* at ¶ 87.

[note 9] 47 C.F.R. § 1.955(a)(2).

[note 10] 47 C.F.R. § 1.925(b)(3).

[note 11] *See* Miami MDS Company and Boston MDS Company for Extension of Time to Construct a Channel 2 Multipoint Distribution Service Station (WLK 230) at Miami, Florida, and Station (WGW339) at Boston, Massachusetts, Memorandum Opinion and Order, 7 FCC Rcd 4347, 4348-49 ¶ 12 (1992) (*strict enforcement of construction deadline to ensure that service is not delayed or denied to the public*).

Id. at 23,983-84 (emphases added; footnotes retained).

Further support for Mr. Havens's and SkyTel's proposed definition of "constructed" and "construction" can be found in the online glossary for the FCC's Universal Licensing System (ULS). The Universal Licensing System's online glossary defines "Construction Requirements" as "[r]ules requiring wireless licensees to construct facilities and commence service within a specified time after the license grant date (the construction period)." <http://wireless.fcc.gov/uls/index.htm?job=glossary>. The ULS glossary further explains: "If the licensee fails to construct and commence service within the construction period, and does not receive an extension of time, the license automatically terminates. 'Commencement of service' refers to commencing actual operation of the facility." *Id.*

For further expressions of the views of Mr. Havens and SkyTel companies on "constructed," "construction," and other related terms at issue in this proceeding, see *Objections to Maritime's First Draft Glossary* (filed by Robert H. Jackson, Esq., Oct. 2, 2012), *Substantive Objections to Maritime's First Draft Glossary* (filed by Robert H. Jackson, Esq., on Oct. 2, 2012), and the exhibits attached to those memoranda.

Respectfully submitted,

A handwritten signature in cursive script that reads "James Ming Chen".

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Dated: December 5, 2012

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 5, 2012, I caused a true copy of the foregoing filing in FCC docket 11-71 to be served by USPS first class mail (with complimentary email copies, using emails of record) to:

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